

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 621(a)(1) of the
Cable Communications Policy Act of 1984 as
amended by the Cable Television Consumer
Protection and Competition Act of 1992

MB Docket No. 05-311

**COMMENTS OF ANNE ARUNDEL COUNTY, MARYLAND; THE CITY OF
CARLSBAD, CALIFORNIA; THE CITY OF DUBUQUE, IOWA; THE CITY OF
LAREDO, TEXAS; MONTGOMERY COUNTY, MARYLAND; THE CITY OF
REDONDO BEACH, CALIFORNIA; THE CITY OF ST. LOUIS, MISSOURI; AND
THE CITY OF WILMINGTON, DELAWARE**

Anne Arundel County, Maryland; the City of Carlsbad, California; the City of Dubuque, Iowa; the City of Laredo, Texas; Montgomery County, Maryland; the City of Redondo Beach, California; the City of St. Louis, Missouri; and the City of Wilmington, Delaware (together referred to herein as the “Local Community Coalition”) respectfully submit these brief Comments in response to the Further Notice of Proposed Rulemaking released by the Commission on March 5, 2007 (“FNPRM”) as ¶¶ 139-143 of its Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding, FCC 06-180 (“R&O”).¹

¹ *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, as amended by the Cable Television and Consumer Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking (March 5, 2007).

The FNPRM proposes to extend the regulations and findings of the R&O to incumbent cable operators as well as the new entrants addressed in the R&O. The Local Community Coalition opposes such an extension for several reasons, which are summarized briefly here.

First, the Commission's actions in the R&O are already unlawful. The R&O exceeds the FCC's statutory authority. It is arbitrary and capricious, an abuse of discretion. It is unsupported by specific, documented substantial evidence; given the alleged examples cited, it appears to be based on so meager and distorted a factual record that any conclusions based on those examples are fatally flawed. The R&O violates the United States Constitution, including, without limitation, the Fifth and Tenth Amendments, and is otherwise contrary to law.

Second, the Commission's unwarranted intrusion into the local franchising process is premised on the assumption (wholly unsupported by the record as presented in the R&O) that it will automatically accelerate the entry of new competitors into the cable market. *See, e.g.*, ¶¶ 1, 2, 5. Even if one were to suppose that the R&O could accelerate competition by *new* entrants (and it will not), it can have no such result as to existing cable operators. Thus, the policy rationale on which the Commission attempted to justify the R&O does not support the proposed extension of the new federal regulatory scheme to incumbents with existing contracts.

Third, by attempting to overturn long-established practices and interpretations of the Cable Act, the R&O *creates* market uncertainty, rather than resolving it. The vagueness of the statements in the R&O amplify this uncertainty. For example, the Commission boldly proscribes "unreasonable build-out mandates," but its examples of such alleged unreasonable "mandates" are peculiar and largely unilluminating. *See* R&O at ¶ 89. The R&O's vague language simply encourages a franchise applicant to attack any build-out requirement it does

not like as “unreasonable” and threaten litigation as a result. The increased uncertainty generated by the R&O is already disrupting franchise negotiations and upsetting the careful balance set up by the Cable Act. The Commission’s proposed additional regulation would vastly extend that disruption.

More specifically, the FNPRM asks for comment on three particular questions.

(1) The FNPRM proposes to apply “the findings in this *Order*” to incumbent cable operators “as they negotiate renewal of those agreements with LFAs.” FNPRM at ¶ 140. This is obviously unworkable as to some of the R&O’s positions. For example, the R&O’s 90- and 180-day deadlines for grant of competitive franchises (¶¶ 70-71) are inconsistent with the 36-month renewal procedure laid out in the Cable Act, 47 U.S.C. § 546. Other “findings” in the R&O, even if they were not fallacious, could not be applied to an incumbent without detailed examination of the particular circumstances of its franchise in that community. For example, how can the Commission attempt to mandate the respective public, educational and governmental (PEG) access obligations of an incumbent and a new entrant when the former already has facilities in place performing functions such as upstream carriage of PEG programming from an origination point to the headend – facilities on which the new entrant itself may plan to rely by picking up the PEG programming from the incumbent?²

(2) The FNPRM asks about the effect of the “findings” in the R&O on “most favored nation clauses that may be included in existing franchises.” FNPRM at ¶ 140. That phrase appears to refer to clauses under which a cable operator may be contractually required to extend to a given community terms as good as those it affords to certain other (often nearby)

communities. Where such a clause exists, it represents a benefit negotiated by the local community in exchange for other trade-offs in the context of a complete agreement. If the FCC were to tamper with such a contractual term without understanding the particular agreement, it would disrupt the balance of benefits and obligations bargained for by the parties to the contract. As with other franchise terms, uninformed intervention by federal government regulators would be as likely to do harm as good, and the uncertainty created by such *ad hoc* intrusions would further destabilize the market.

(3) The FNPRM recognizes that the Commission cannot override a community's right to establish customer service rules, which flows from its basic governmental powers and is guaranteed by the Cable Act. R&O at ¶¶ **141-143**. In the face of the clear statutory language, it is unclear why the Commission felt compelled to raise the issue at all.

For more detailed discussion, please see the comments of the National Association of Telecommunications Officers and Advisors (NATOA) *et al.*, which the Local Community Coalition supports.

² See, *e.g.*, Reply Comments of Anne Arundel County, Carroll County, Charles County, Howard County, Montgomery County, and the City of Baltimore, Maryland, at **34-36** (filed March **28, 2006**).

For the reasons indicated above, the Commission should decline to extend further the unlawful conclusions of the R&O.

Respectfully submitted,

A handwritten signature in cursive script, reading "Frederick E. Ellrod III", written in dark ink.

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April 20, 2007

CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)

The below-signed signatory has read the foregoing Comments of Anne Arundel County, Maryland; the City of Carlsbad, California; the City of Dubuque, Iowa; the City of Laredo, Texas; Montgomery County, Maryland; the City of Redondo Beach, California; the City of St. Louis, Missouri; and the City of Wilmington, Delaware, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,

April 20, 2007

Date

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